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Strasbourg's Public-Private Divide and the British Bill of Rights

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This article explores Strasbourg's approach to the public-private divide in the state responsibility and Art 34 ECHR contexts, which must be correctly understood during the design of the proposed new British Bill of Rights (BBOR). It attempts to make sense of a number of authorities that are at serious risk of being misinterpreted as a result of Radio France v France. The argument is that Radio France is best construed as representing a public-policy exception to Strasbourg's general approach in this area, and that neither that case nor the numerous subsequent cases to have relied on it fundamentally alter that approach. The implications of Strasbourg's approach for domestic law – including for the new BBOR – are discussed.

This year's general election result confirms that repeal of the Human Rights Act 1998 (HRA) is no longer a distant dream on the part of anti-European politicians and tabloid newspapers. Having returned to office rejuvenated with a House of Commons majority and acting under a manifesto pledge to 'scrap the Human Rights' Act and replace it with a British Bill of Rights (BBOR),¹ the Prime Minister faces evident pressure to press on with his plans.

The road ahead for the new Government is far from clear, however. Delay is inevitable as it negotiates a number of thorny political and legal obstacles.² The

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¹ Conservatives, *The Conservative Party Manifesto 2015* (available at www.conservatives.com).

² The devolution issue is one: Steven Greer and Rosie Slowe, 'The Conservatives' proposals for a British Bill of Rights: mired in muddle, misconception and misrepresentation?' [2015] EHRLR 372, 381.

Queen's Speech revealed only a weak commitment to 'bring forward proposals' for a BBOR over the coming year,³ in marked contrast to the tougher rhetoric that featured heavily in the build-up to the election only a few weeks earlier. But delay is certainly no bad thing, representing a valuable opportunity for the legal community to ponder and debate the issue of BBOR design. Like many I am sceptical about the Conservative plans, which are generally poorly reasoned and betray confusion over the workings of the HRA.⁴ Effort invested in debating the content of the new BBOR is effort well spent.

In this article my contribution to the discussion is to offer some thoughts on the scope of rights protection under the new BBOR; that is, on the form and content of what is currently s 6 HRA, subsection (1) of which provides that 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' More specifically I concern myself with the Strasbourg jurisprudence on the notion of the governmental organisation, which forms the basic public-private backdrop to the domestic system of rights protection for the reasons explained below. As I have argued before, it is essential to understand the Strasbourg framework correctly before any sensible attempt can be made to tackle the public-private divide in domestic human rights law.⁵ The scope of the public authority concept has been one of the most controversial HRA matters since the Act entered into force. The courts' treatment of the issue has drawn considerable academic criticism,⁶ as well as correcting legislation from Parliament,⁷ and the definition of public authority is the only aspect of the HRA that the Government-appointed commission agreed 'should be looked at again'

³ Available at <https://www.gov.uk/government/speeches/queens-speech-2015>.

⁴ See especially Greer and Slowe (fn 2); Alison Young, 'HRA Howlers: The Conservative Party and Reform of the Human Rights Act 1998' UK Const. L. Blog, 7 October 2014 (available at <http://ukconstitutionallaw.org>).

⁵ Alexander Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act: Private Contractors, Rights-Stripping and "Chameleonic" Horizontal Effect' [2011] PL 139.

⁶ See especially Paul Craig, 'Contracting out, the Human Rights Act and the Scope of Judicial Review' (2002) LQR 551; Alexander Williams, 'YL v Birmingham City Council: Contracting out and "functions of a public nature"' [2008] EHRLR 524.

⁷ The result in *YL v Birmingham City Council* [2007] UKHL 27 was reversed by the Health and Social Care Act 2008, s 145. See now Care Act 2014, s 73.

in the event of a BBOR being taken forward.⁸ Clearly there is room for informed recommendations to be made on the public authority issue as the Government's BBOR project enters its newest phase, all the more so since the Conservatives have left the issue undiscussed in their plans to date.

When referring to the notion of 'governmental organisation' in Strasbourg, I refer to two distinct but related things. The first is the distinction between governmental and non-governmental organisations under Art 34 ECHR, which provides that the European Court of Human Rights (ECtHR) 'may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of [an ECHR] violation'. *Governmental* organisations are therefore precluded from filing claims, so a rich body of jurisprudence has emerged on the governmental/non-governmental distinction. The second is the category of bodies that directly engage the state's responsibility in Strasbourg. The state is not of course responsible for the actions of everyone, and is only directly responsible for the actions of core organs of state: central and local government departments, the military and police, and so on. A private body may only engage the state's responsibility *indirectly*, if the state is under a positive obligation to protect another individual from them.⁹ Like Art 34, the state responsibility issue therefore requires Strasbourg to classify a particular body as either 'state' or 'non-state'. Strasbourg has indicated that the same basic distinction applies in both the Art 34 and state responsibility contexts: the bodies for which the state is directly responsible are the same 'governmental organisations' that lack ECHR rights under Art 34.¹⁰ Thus, in this article I use the umbrella term 'governmental organisation' to refer to both sets of bodies.

Elsewhere, I have made the basic argument that Strasbourg's governmental/non-governmental organisation distinction is underpinned by what I term the 'selflessness' principle; that is, the idea that the state differs

⁸ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Volume 1) [97].

⁹ See e.g. *Von Hannover v Germany* (2005) 40 EHRR 1; *Edwards v United Kingdom* (2002) 35 EHRR 487.

¹⁰ See especially *Samsonov v Russia* App no 2880/10 (ECtHR, 19 September 2014) [63]; *Hautaniemi v Sweden* (1996) 22 EHRR CD155; *Danderyds Kommun v Sweden* App no 52559/99 (ECtHR, 7 June 2001), applied in *Grampian University Hospitals NHS Trust v Napier* 2004 JC 117; *Novoseletskiy v Ukraine* (2006) 43 EHRR 53 [82].

fundamentally from the individual in institutional terms because it is under a duty to act 'selflessly', in the public interest rather than for its own ends.¹¹ As Laws J has put the idea, the state has 'no rights of its own, no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence.'¹² The principle is theoretically uncontroversial, rooted in the state's need to justify the power it wields over its subjects. Exactly how it does this is a complex matter of political theory,¹³ but the justification must at least begin with the state appreciating that its power is to be used for the public benefit.¹⁴ Without this justification the state would be no more than a robber-band writ large, as St Augustine observed.¹⁵ The individual's position differs starkly, however. It is the backbone of liberal theory that individuals may act for whatever motivation they wish within the confines of the law. Unlike the state, individuals are constitutionally entitled to act self-servingly, as many will do (by e.g. acting for profit-making purposes), as long as their activities do not violate the existing criminal law or law of tort, contract and so on. In the exercise of the residual liberty left to them by the existing law, they can do whatever they please.¹⁶

This piece explores a specific subset of the governmental organisation case-law that carries a real risk of being misunderstood. Despite the selflessness principle being workable and well-established in the Strasbourg case-law, these cases are in danger of wrongly being regarded as having changed the law in this area. The root of the problem is *Radio France v France*,¹⁷ where a state-owned media broadcaster was allowed to rely on its right to freedom of expression under Art 10. I argue that *Radio France* is best construed as a public-policy exception to the law, allowing a media broadcaster to enforce its Art 10 right

¹¹ Williams (fn 5) 145-154.

¹² *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (HC).

¹³ On which see Leslie Green, *The Authority of the State* (Clarendon 1988).

¹⁴ See also the work of e.g. H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon 1994); Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (OUP 2011); Green (*ibid.*).

¹⁵ St Augustine, *City of God* (Doubleday 1958).

¹⁶ Some may of course choose to act altruistically, however.

¹⁷ (2005) 40 EHRR 29 (admissibility decision of 23 September 2003).

notwithstanding that it is otherwise a governmental organisation. *Radio France* did not therefore change the law more generally, and nor did the many cases that have relied on it since. The selflessness principle remains the foundational principle in this area. I further argue that this is confirmed by the recent Grand Chamber judgment of *Kotov v Russia*,¹⁸ which has so far received no real judicial or academic attention on the point. Not only is my *Radio France* analysis useful on a general level, given that a proper understanding of the Strasbourg scheme is key to navigating the domestic human rights framework for the reasons given below, but more specifically it also has implications for the BBC's ability to rely on the ECHR, which was briefly considered by the Supreme Court last year.¹⁹

The argument proceeds in three steps. Part A primes the canvas for the analysis that follows, briefly expounding my earlier thesis on the selflessness principle and further explaining the relevance of the Strasbourg framework to the BBOR issue in domestic law. Part B considers *Radio France*, advancing the public-policy argument described above and discounting a number of alternative interpretations. Part C considers the cases to have relied on *Radio France* since the ruling was handed down, construing them in context and explaining why they should not be seen as altering the ECtHR's approach.

A. THE SELFLESSNESS PRINCIPLE AND DOMESTIC LAW

Readers may already have spotted that my arguments in the preceding discussion rest on two assumptions about the nature of whatever concrete plans emerge for the BBOR. The first is that the BBOR would maintain the HRA's basic distinction between public and private in determining which bodies/functions should be amenable to rights-based challenge. This is nothing controversial. There is a basic state/non-state distinction in Strasbourg for the similar purpose of state responsibility, as seen above, and none of the Conservatives' proposals to date have suggested that the BBOR might abandon the public-private distinction in

¹⁸ App no 54522/00 (ECtHR, 3 April 2012).

¹⁹ *Re BBC* [2014] UKSC 25.

favour of rendering the rights fully horizontally effective against private as well as public activity. Their aim is hardly to expand the reach of the ECHR in domestic law, after all.

The second assumption is that the new BBOR would continue to model itself on the ECHR, as the HRA does, rather than containing a brand new catalogue of fundamental rights devised from scratch. Again, this is nothing controversial since the Conservatives have said as much. Although they have pledged to cut the ties with Strasbourg and '[c]larify the Convention rights so as to reflect a proper balance between rights and responsibilities', the text of the ECHR would be 'put... into primary legislation' and the BBOR would 'not introduce new basic rights'.²⁰ The Conservatives' criticism is with Strasbourg's interpretation of the ECHR rather than with the ECHR itself: 'There is nothing wrong with that original document, which contains a sensible mix of checks and balances alongside the rights it sets out.'²¹ So even though the links between domestic and Strasbourg interpretations of the ECHR are set to be weaker under the new BBOR than under the HRA, the ECHR will still underlie the domestic rights framework, at least to some extent, and the imperative to understand the ECHR properly will therefore remain. This imperative will be stronger still in the (likely) event that the UK remains a signatory to the ECHR in international law, since the BBOR will still need to perform the HRA's basic pragmatic function of providing domestic remedies for ECHR violations that would be actionable in Strasbourg. On this basis the Strasbourg jurisprudence would continue to matter, even if the judges were not specifically instructed to take it into account.

I also make a third assumption about the BBOR, namely that the BBOR equivalent of s 6 HRA would continue to rely on the basic concepts of 'core' and 'hybrid' public authorities. Under s 6(1) HRA it is unlawful for a public authority to act incompatibly with the ECHR, but 'public authority' lacks a comprehensive definition. Section 6(3) merely provides that it 'includes' courts and tribunals (s 6(3)(a)) and 'any person certain of whose functions are functions of a public

²⁰ Conservatives, *Protecting Human Rights in the UK* (2014) 5 (available at www.conservatives.com).

²¹ *ibid.*

nature' (s 6(3)(b)). The bodies mentioned under s 6(3)(b) are commonly known as 'hybrid' public authorities. These are private bodies that perform a mixture of public and private functions and are amenable to the ECHR in respect of their public acts. This 'hybrid' liability is emphasised by s 6(5), which provides that 'In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.' In their private capacities hybrids therefore retain their status as ordinary private bodies.

Section 6(3)(b)'s use of the word 'includes' implies that *other* public authorities must exist. These are 'core' public authorities, which are *obviously* public bodies such as central and local government departments and the NHS. Unlike hybrids they are amenable to the ECHR in respect of *all* their activities, whether public or private in nature. This is evident from s 6(5), which relieves public authorities of the duty to comply with the ECHR when acting privately. But it only applies to *hybrid* authorities, not core ones as well. Like the first two assumptions, this third assumption – that the BBOR would retain the HRA's core/hybrid setup – is also uncontroversial. So far there has been no suggestion that it would depart from the hybrid public authority concept, which would leave private bodies entirely free from any direct rights-based challenge in domestic law,²² however obviously public the function they performed might be. This would be a deeply retrogressive step, even for the hardest of pro-business hardliners concerned about the effect on profit-making organisations of being subjected to ECHR claims. It would render the BBOR's scope vastly narrower than that of domestic judicial review, which recognises that private bodies do sometimes perform public functions and may therefore be amenable to public-law challenge.²³ Even hardliners would find it difficult to criticise Keith J's decision that a private, profit-making psychiatric hospital exercising Mental Health Act

²² *Indirect* challenge would be possible, however, through s 3 HRA (e.g. *Ghaidan v Ghodin-Mendoza* [2001] UKHL 30) and the court's duty as a public authority to develop the common law compatibly with the ECHR (e.g. *Campbell v MGN* [2004] UKHL 22).

²³ One recent example is *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin).

powers to detain and treat inpatients against their will, for example, should be required to respect the detainee's human rights.²⁴

With the foregoing in mind, a proper understanding of Strasbourg's governmental organisation concept is crucial because it can be seen to inform the domestic system of rights protection in two fundamental ways. First, by determining the issue of which bodies directly engage the state's responsibility in Strasbourg, the governmental organisation jurisprudence can help the courts decide which bodies should be regarded as public authorities in domestic law. If a body would directly engage the state's responsibility in Strasbourg, it stands to reason that there should be a remedy against it in UK courts. Indeed, this point was recognised in *Parochial Church Council of Aston Cantlow v Wallbank*, in which the House of Lords reasoned that Strasbourg's category of governmental organisations mirrors the category of core public authorities under the HRA. As Lord Hope explained:

'a distinction should be drawn between those persons who, in Convention terms, are governmental organisations on the one hand and those who are non-governmental organisations on the other. A person who would be regarded as a non-governmental organisation... ought not to be regarded as a "core" public authority for the purposes of section 6.'²⁵

This is a sensible proposition, not least because there is an obvious parallel between governmental organisations and core public authorities in terms of the extent to which each is expected to obey the ECHR.²⁶ Just as core public authorities are liable under s 6 HRA in respect of all their acts, whether public or private, governmental organisations directly engage the state's responsibility in Strasbourg whatever the nature of their behaviour. They are governmental

²⁴ See *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin).

²⁵ [2003] UKHL 37 [47]. See also [6]-[7] (Lord Nicholls), [160] (Lord Rodger), [129] (Lord Scott) and [87] (Lord Hobhouse).

²⁶ For a further parallel based on the selflessness principle, see Dawn Oliver, 'The Frontiers of the State: Public Authorities and Public Functions Under the Human Rights Act' [2000] PL 476, 483.

through and through,²⁷ and the state will be unable to avoid responsibility for the actions of governmental organisations by alleging that the behaviour was merely ‘private’ behaviour such as concluding contracts or disposing of land. The need to hold core public authorities to ECHR standards at all times therefore follows not just from s 6(5) HRA, but also from the Strasbourg scheme.

The second sense in which the governmental organisation jurisprudence informs the domestic human rights framework is via what can be termed the ‘rights-stripping’ issue. Since Art 34 prevents governmental organisations from relying on the ECHR, and given the link described above between governmental organisations and public authorities under the HRA, it follows that certain public authorities will lack ECHR protection as a matter of domestic law. This is confirmed by s 7 HRA, which mirrors the Art 34 test by providing that a person can only be regarded as a victim of an unlawful act ‘if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.’²⁸ As has been judicially recognised, core public authorities are necessarily precluded from relying on the ECHR because they are inherently governmental organisations who will therefore fail this standing test.²⁹

The position with hybrid public authorities is less straightforward, however. Whilst it is clear that hybrids may rely on the ECHR when acting privately since in this capacity they fall to be treated like any other private bodies, the status of hybrids when performing *public* functions is a much greyer area. The question rests on a detailed and accurate understanding of the voluminous Strasbourg cases on the governmental organisation concept, which remains significantly under-analysed both academically and judicially.³⁰ If private bodies become governmental organisations under the ECHR when performing public functions, then it is clear that they will fail the Art 34 test and be ‘stripped’ of their rights

²⁷ *Ayuntamiento de Mula v Spain* App no 55346/00 (ECtHR, 1 February 2001); *Danderyds* (fn 10).

²⁸ HRA, s 7(7).

²⁹ *Aston Cantlow* (fn 25) [8] (Lord Nicholls).

³⁰ But see Helen Quane, ‘The Strasbourg Jurisprudence and the Meaning of “Public Authority” Under the Human Rights Act’ [2006] PL 106, discussed in Williams (fn 5).

when performing that function. Governmental organisations, of course, cannot bring rights claims. But if private bodies remain *non*-governmental organisations when performing public functions, the opposite is true: they will pass both the Art 34 test and the domestic standing test under s 7 HRA and will be able to plead their ECHR rights both in Strasbourg and before UK courts.

The rights-stripping issue is an important one in itself, given the number of private organisations across the Council of Europe who perform public functions and will be keen to know whether they enjoy their own ECHR rights when doing so. But it also has important ramifications for domestic law, because the outcome has the potential to affect the scope of hybrid public authority liability, whether under the HRA or the new BBOR. The meaning of a public function under s 6(3)(b) HRA has been much contested, and the courts have drawn considerable fire for an unduly narrow formulation that causes particular problems for the recipients of services that have been contracted out, from central or local government, to private providers such as charities and commercial companies.³¹ The consequence for a private body of being deemed a hybrid public authority is a highly relevant factor to consider when determining how broadly to interpret a public function. Stripping private bodies of their own ECHR rights is a draconian step, and something militating towards a narrower reading of a public function. By contrast, the case for a broader reading becomes stronger if it can be shown that hybrids retain their rights, since praying in aid their own rights would constitute an important line of defence to ECHR challenges that are mounted against them. For a private care home operator seeking to resist an Art 8 claim by an evicted resident, for example, it may be a game-changer to be able to plead its own right to respect for property under Art 1 of the First Protocol (FP).

While the rights-stripping issue has been little discussed explicitly, various academics and senior judges seem to have assumed that hybrid public authorities

³¹ See especially Craig (fn 6); Shazia Choudhry, 'Children in "care" after *YL* – the ineffectiveness of contract as a means of protecting the vulnerable' [2013] PL 519.

lose the ability to rely on the ECHR in their public capacities.³² This idea demands the very closest scrutiny. It must be proven, not simply taken for granted. The idea that hybrids are rights-stripped is mentioned nowhere in the HRA, and misinterpreting the Strasbourg jurisprudence to require rights-stripping is potentially disastrous for exposing the UK to a barrage of ECHR claims by aggrieved hybrids whose rights would be enforceable in Strasbourg. In these circumstances rights-stripping would also risk placing the UK in breach of Art 14 ECHR by denying rights protection on the basis of one's status as a private body performing a public function in domestic law.³³ Denying ECHR protection for this reason is little different to denying protection to those with red hair, or to fishing companies without the requisite number of British directors, to borrow from some familiar public-law examples. Correctly understanding the Strasbourg jurisprudence is therefore crucial.

As I explained above and have argued before,³⁴ the governmental organisation jurisprudence can be rationalised using the selflessness principle. Non-governmental organisations are bodies that are constitutionally entitled to act for their own ends within the confines of the law, whereas governmental organisations are constitutionally 'selfless' bodies that are created and may also be controlled – through domestic law and/or mechanisms of democratic accountability – to serve the public interest over their own. Profit-making companies would therefore qualify as non-governmental organisations; bodies like the Home Office, Ministry of Defence and police force as governmental ones. This is not to say that a body's status will always be crystal clear, however. Penumbral cases may exist.³⁵ But the selflessness principle can be said to enjoy a

³² See e.g. *YL v Birmingham City Council* [2007] EWCA Civ 26 [75]; Oliver (fn 26) 492; Helen Fenwick and Gavin Phillipson, *Media Freedom Under the Human Rights Act* (OUP 2006) 122; Quane (fn 30) 109.

³³ Art 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

³⁴ Williams (fn 5) 145-154.

³⁵ See e.g. *Liseyeva and Maslov v Russia* App nos 39483/05 and 40527/10 (ECtHR, 9 October 2014) [197], concerning profit-making companies that were deemed governmental organisations on the basis that they were entirely state-owned and controlled; *Fernandez Martinez v Spain* (2015) 60 EHRR

fairly settled grounding in the case-law in two senses. First, it features prominently in rulings determining that commercial businesses whose sole aim is to make profit cannot qualify as governmental organisations. In *Islamic Republic of Iran Shipping Lines v Turkey*, for example, the ECtHR ruled that ‘the applicant company is run as a commercial business and... therefore there is nothing to suggest that the present application was effectively brought by the State’.³⁶ Similarly, when ruling in *Ukraine-Tyumen v Ukraine* that the applicant enjoyed standing under Art 34 ECHR, the ECtHR stated that ‘there is nothing in the case-file to suggest that the applicant company carried out activities other than those which could be classified as a business’.³⁷ Self-service, it seems, is the antithesis of governmental behaviour. Second, the selflessness principle is able to rationalise tricky or otherwise cryptic cases, bringing the underlying reasoning in those cases to the fore. In *RENFE v Spain*,³⁸ for instance, the applicant was created to run the state rail network. It brought an Art 6 claim alleging that it was denied a fair hearing during a domestic trial. The Commission dismissed the application, holding that the applicant was a governmental organisation and therefore unable to file a claim:

‘the Commission notes that the applicant is a public law corporation, created by the state... to run the state rail network as an industrial company... [I]ts board of directors is answerable to the Government and... [it] is, for the time being, the only undertaking with a licence to manage, direct and administer the state railways, with a certain public-service role in the way it does so. Moreover, the applicant’s internal structure and manner of conducting its business are regulated by [statute]...’³⁹

3, where the Grand Chamber had some difficulty deciding which body – state or non-state – had taken the impugned decision.

³⁶ (2008) 47 EHRR 24 [81].

³⁷ *Ukraine-Tyumen v Ukraine* App no 22603/02 (ECtHR, 22 November 2007) [27]. See further *Transpetrol v Slovakia* App no 28502/08 (ECtHR, 15 November 2011) [62]; *Granitul S.A. v Romania* App no 22022/03 (ECtHR, 22 March 2011) [27].

³⁸ (1997) DR 90-B.

³⁹ *ibid.*

Without an organising principle the Commission's decision becomes difficult to interpret. A body can be more or less accountable to government, regulated by statute and invested with a public-service role. Whether taken alone or together, these factors are all matters of degree and say nothing of *how much* accountability, regulation and public service are necessary to render the body a governmental organisation. The remaining factors are also of no real help. Creation by the state cannot be the overarching test for a governmental organisation given that even quintessentially private, profit-making companies can be said to have been created by the state in the sense that they need bringing into being under the law. Non-governmental organisations are also capable of enjoying monopolies, even over public services such as the provision of transport. The remaining factor is that the applicant was a 'public-law corporation', but the Commission fails to explain what this means. At least in the UK, which differs from its continental counterparts by lacking a strict separation between public and private law,⁴⁰ there would appear to be no such thing.

The selflessness principle brings clarity to the Commission's reasoning, however. The better reading is that the applicant was a governmental organisation because it was a constitutionally 'selfless' organisation created and controlled by the state to serve the public interest over its own. The various factors the Commission mentions – creation by the state to operate a monopoly, accountability to government, regulation by statute, and so on – are all still relevant, but not as justificatory ends in themselves. Rather, they are pieces of evidence suggesting that the applicant was not the kind of organisation that was constitutionally entitled simply to act as it pleased; to pursue whatever interests it wished within the confines of the law, as private individuals may do.

I spare readers any further rehearsal of my earlier arguments on the selflessness principle, which can be found elsewhere.⁴¹ The implications for that principle of *Radio France* and subsequent cases are considered below, but before

⁴⁰ On which see John Allison, *A Continental Distinction in the Common Law* (OUP, Oxford 1994).

⁴¹ Williams (fn 5) 145-154.

examining those cases it is worth stressing the significance of the selflessness thesis for domestic law. The thesis exposes Strasbourg's distinction between governmental and non-governmental organisations as 'institutional' rather than 'functional'; that is, focused on the issue of who the body *is*, rather than the functions it performs. The body's functions may of course be relevant – the greater the number of governmental or public functions it performs, the more likely it is to be a governmental organisation – but the ultimate question is whether or not the body is institutionally part of the 'selfless' state, i.e. a body differing fundamentally from an individual because it is constitutionally required to put the public's interests before its own. This focus on the *institution* makes clear that in Strasbourg there is no equivalent to the kind of 'hybrid' liability found under s 6(3)(b) HRA; no prospect of a private body being treated as a governmental organisation because of the nature of the functions it performs. A body is either institutionally part of the state, or it is not. And if it is *not* part of the state, the body's status remains – even if it performs a public or governmental function. Non-governmental organisations are non-governmental through and through.

Two particular consequences follow. First, the idea of rights-stripping hybrid public authorities dies in the water. Since non-governmental organisations are non-governmental through and through, they retain the right to rely on the ECHR under Art 34 *at all times*. Even when acting in their public capacities they will be regarded by Strasbourg as non-governmental organisations that enjoy their own ECHR rights. In the absence of any indication to the contrary under the HRA, and assuming no such indication in the new BBOR, the same will therefore follow in domestic law: s 7 HRA replicates the Art 34 standing test, as seen above. Second, the lack of any hybridity doctrine in Strasbourg means that the governmental organisation jurisprudence will be unable to assist domestic courts when attempting to define a public function under s 6(3)(b) HRA and its BBOR equivalent.⁴² The two schemes concern entirely different issues. Under s 6(3)(b)

⁴² cf Quane (fn 30), whose analysis I have addressed at length: Williams (fn 5) 145-154.

the courts are identifying the kinds of functions that trigger ECHR duties for private bodies; in the governmental organisation context the ECtHR is asking itself the prior question of whether or not the body is institutionally private in the first place. Whether under the HRA or BBOR, the governmental organisation case-law is unable to provide the answer to the public-function question. Its only relevance is to *core* public authorities.

B. *RADIO FRANCE v FRANCE*

The point, then, is that the selflessness principle underlies the governmental/non-governmental organisations distinction in Strasbourg. The following two sections explore the principle in the light of various cases that might be thought to strain it. This section begins with *Radio France*, proffering the novel explanation that it is best seen as a public-policy exception to the law. The judgment was handed down some years ago but its true prominence is only becoming significant following the raft of recent Strasbourg cases to have applied it. Significantly, *Radio France* has not always been cited and relied on in context. Given some of the *dicta* in that judgment and the volume of cases to have considered it since, it is essential that *Radio France* and its progeny be subjected to careful interpretation. Only then can the Strasbourg case-law and its effect on the domestic scheme of rights protection be properly appreciated.

The applicants in *Radio France* were a state-owned broadcaster (Radio France), its editor and a journalist. They aired a repeat newflash alleging complicity by the former deputy mayor of Paris in war crimes committed in Nazi-occupied France during World War Two. The applicants were convicted of criminal defamation and claimed violations of Arts 10, 6 and 7 ECHR in Strasbourg. In its merits decision the ECtHR found no violations but rejected France's prior contention that Radio France was precluded by Art 34 from filing a claim. It began the analysis by stating that governmental organisations encompass not only 'the central organs of the State, but also... decentralised

authorities that exercise “public functions”, regardless of their autonomy *vis-à-vis* the central organs.’⁴³ It continued:

‘In order to determine whether any given legal person other than a territorial authority [is a governmental organisation], account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.’⁴⁴

The distinction the ECtHR draws between ‘territorial authorities’ and other legal persons falling into the governmental organisation category might be read as mirroring the distinction between core and hybrid public authorities under the HRA.⁴⁵ Perhaps territorial authorities are inherently governmental organisations, the ‘other’ persons that fall into the governmental organisation category being *non-governmental* organisations who are clothed with governmental status when exercising the ‘public functions’ to which the ECtHR refers. This assumes too much, however. The ECtHR makes no attempt to explain the distinction it draws between ‘territorial’ authorities and other bodies falling into the governmental organisation category;⁴⁶ and although its ‘public functions’ terminology closely resembles the language of ‘functions of a public nature’ in s 6(3)(b) HRA, the two terms are by no means the same. Strasbourg not uncommonly uses the phrase ‘public functions’ as mere shorthand to describe the functions performed by an undoubtedly governmental organisation. In the *16 Austrian Communes* case, for instance, the Commission held that ‘local government organisations such as

⁴³ *ibid.*, [26].

⁴⁴ *ibid.*

⁴⁵ Indeed, this is Quane’s interpretation: fn 30, 118.

⁴⁶ The distinction was repeated but left unexplained in the ECtHR’s most recent *Practical Guide on Admissibility Criteria* (2015) 60 EHRR SE8 159.

communes, which exercise public functions on behalf of the State,' were 'clearly' governmental organisations under Art 34.⁴⁷

Radio France is admittedly a difficult case to interpret, because various factors suggest the broadcaster was a 'selfless' body that was created and controlled to serve the public interest over its own. The ECtHR observed that the state 'holds all of the capital in Radio France', that Radio France's 'memorandum and articles of association are approved by decree' and that Radio France 'performs public-service missions in the general interest'.⁴⁸ Yet the end result was to rule that Radio France enjoyed standing as a *non*-governmental organisation under Art 34. The ECtHR observed that Radio France 'does not come under the aegis of the State, but is under the control of the CSA [*Le Conseil superieur de l'audiovisuel*, an independent broadcasting regulator]';⁴⁹ and that only a minority of its board members were state representatives.⁵⁰ Given also that Radio France lacked a monopoly (operating instead in a competitive environment) or any special powers 'beyond those conferred by ordinary law', the ECtHR concluded that 'the legislature has devised a framework... plainly designed to guarantee [Radio France's] editorial independence and... institutional autonomy'.⁵¹

Two superficially plausible interpretations of the ruling can be discounted. The first, and perhaps the most obvious given the ECtHR's emphasis on institutional independence, is to read the ruling as establishing that Radio France's independence rendered it a constitutionally 'selfish' organisation rather than a selfless one required to serve the public interest. Whilst viewing Radio France as a selfish organisation sits uneasily with Strasbourg's observations that it was entirely state-owned and saddled with various public-interest obligations, this interpretation would comport with the general approach in this area by maintaining the selflessness principle as the governmental/non-governmental

⁴⁷ *16 Austrian Communes and some of their councillors v Austria* App nos 5767/72 and 5922/72 (ECtHR, 31 May 1974). See also *Rothenthurm Commune v Switzerland* App no 13252/87 (ECtHR, 14 December 1988); *Ayuntamiento de Mula* (fn 27).

⁴⁸ *Radio France* (fn 17) [26].

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

distinction's organising feature. This principle has not of course been explicitly recognised by the ECtHR, but it seems well embedded in the case-law on a deeper level for the reasons given above. Viewing Radio France as a 'selfish' organisation also derives support from some of the remaining factors mentioned by the ECtHR to support its conclusion: that Radio France lacked any coercive powers, which are commonly possessed by governmental organisations;⁵² and that it operated in a competitive market, which may have required it to behave in self-interested, commercial manner in order to survive. Militating against this point, however, is the ECtHR's observation that Radio France 'depends to a considerable extent on the State for its financing'⁵³ rather than on private profit, the implication being that commercial behaviour was not *essential* to its survival.

The second interpretation takes *Radio France* as establishing that the broadcaster was a non-governmental organisation due to its institutional independence alone. There must be at least some link between independence and non-governmental status, after all.⁵⁴ But this interpretation is difficult to sustain because it involves supplanting the selflessness principle with institutional autonomy as the overarching test for the meaning of a governmental organisation. In particular, this would jar with Strasbourg's frequent indication that institutional autonomy is insufficient, of itself, to render a body a non-governmental organisation. In *Danderyds Kommun v Sweden*, for example, the ECtHR held that local municipalities, as 'decentralised authorities that exercise public functions,' were governmental organisations 'notwithstanding the extent of their autonomy *vis-à-vis* the central organs.'⁵⁵ This second interpretation of *Radio France* is also difficult to square with the Grand Chamber's fairly recent affirmation of the selflessness principle in *Kotov v Russia*,⁵⁶ which concerned the status of a liquidator appointed to manage an insolvent bank that the applicant had secured a debt judgment against in domestic law. The applicant alleged that

⁵² Oliver (fn 26) 481.

⁵³ *Radio France* (fn 17) [26].

⁵⁴ Indeed, see *Liseyeva* (fn 35).

⁵⁵ *Danderyds* (fn 10). See also *Consejo General de Colegios Oficiales de Economistas de España v Spain* (1995) DR 82-B; *Dzugayeva v Russia* App no 44971/04 (ECtHR, 12 April 2013) [17].

⁵⁶ *Kotov* (fn 18).

the liquidator had acted unlawfully by repaying some of the bank's creditors in full, leaving him with only a fraction of what he was owed, and claimed a breach of Art 1 FP. On the state responsibility point the Grand Chamber reversed Strasbourg's first-instance decision that the liquidator's functions rendered him a 'representative of the state,'⁵⁷ deciding instead that he was a *non-governmental* organisation who engaged the state's responsibility through the positive obligations doctrine.⁵⁸

The selflessness principle appears prominently in the Grand Chamber's emphasis on the essentially commercial, self-serving purpose to the liquidator's functions. Although his appointment was confirmed by a judge, the liquidator had 'very limited powers'⁵⁹ – in particular, 'no coercive or regulatory power in respect of third parties'⁶⁰ – and 'enjoyed a considerable amount of operational and institutional independence'.⁶¹ He 'was a private individual employed by the creditors' body, which was a self-interested entity';⁶² and his 'task was... similar to that of any other private businessman appointed by his own clients, in this case the creditors, to best serve their – and ultimately his own – interests.'⁶³ However tempting it may seem to read *Radio France* as having changed Strasbourg's basic approach to the governmental organisation concept, *Kotov* renders such a reading untenable.

The third – and preferable – interpretation of *Radio France* is as an exception to the selflessness principle: Radio France bore the hallmarks of a governmental organisation but the ECtHR nevertheless allowed it to rely on Art 34 in order to plead its Art 10 right. The fundamental importance of a free media has been recognised domestically,⁶⁴ and by Strasbourg,⁶⁵ and state-owned broadcasters are evidently in a unique position relative to other governmental organisations

⁵⁷ (ECtHR, 14 January 2010) [52].

⁵⁸ *Kotov* (fn 18) [107].

⁵⁹ *ibid.*, [105].

⁶⁰ *ibid.*

⁶¹ *ibid.*, [107].

⁶² *ibid.*, [100].

⁶³ *ibid.*, [104].

⁶⁴ *Derbyshire County Council v The Times Newspapers Ltd* [1993] AC 534 (HL).

⁶⁵ *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153; *Jersild v Denmark* (1995) 19 EHRR 1.

due to the centrality of informed public debate, and thus their core mission, to democracy. Especially since they are unable to fulfil that mission without a basic right to free speech, and also that they may be subject – like Radio France – to clear legal obligations to serve the public interest, the case for making such an exception becomes compelling. The ECtHR also seemed keen to engineer this result, explaining that its conclusion on Radio France’s Art 34 status dovetailed with Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe to member States on the guarantee of the independence of public service broadcasting, ‘whose recitals reiterate that the independence of the media is essential for the functioning of a democratic society’.⁶⁶

This interpretation is not entirely without difficulty, especially since the upshot of the ruling was to allow Radio France to rely not just on Art 10 ECHR but on Arts 6 and 7 as well. There is also little guidance from subsequent cases on *Radio France*’s true meaning. The ruling has only been explored in a handful of media freedom cases, in none of which are the facts directly analogous or is there any real attempt to construe it. *Radio France* was applied in *Österreichischer Rundfunk v Austria*,⁶⁷ where the ECtHR held that a public broadcaster could mount an Art 10 claim, but *Rundfunk* is easier to reconcile with the selflessness principle because the broadcaster was not as obviously created by law and subject to particular public-interest obligations as Radio France. In *Mackay and BBC Scotland v United Kingdom*⁶⁸ the ECtHR was content to rely in part on *Radio France* ‘to proceed on the basis that BBC Scotland can be considered to be a victim’, but there was no real analysis of the Art 34 issue: the UK conceded that the BBC could bring a claim. In *Re BBC* Lord Reed relied on *Radio France* to support his view that the BBC enjoyed ECHR rights under Art 34,⁶⁹ but since the point was not argued before the Supreme Court this was the only reference to *Radio France*; its meaning remained unexplored.

⁶⁶ *Radio France* (fn 17) [26].

⁶⁷ App no 35841/02 (ECtHR, 7 December 2006).

⁶⁸ App no 10734/05 (ECtHR, 7 December 2010) [19].

⁶⁹ *Re BBC* (fn 19) [69].

Despite these difficulties, the public-policy reading of *Radio France* is still the most attractive. Unlike the second interpretation discussed above, it avoids abandoning the selflessness principle as the overarching test for a governmental organisation – especially significant given *Kotov*. Viewing *Radio France* as exceptional also makes for a more nuanced construction of the law, leaving the idea that Radio France and analogous broadcasters are governmental organisations for the related purpose of state responsibility intact. There is no reason why the notion that state-owned broadcasters can assert their own ECHR rights should result in the state being able to disclaim responsibility for their actions in Strasbourg, after all. Under *Radio France* the BBC would therefore be able to safeguard its own right to freedom of expression, for example, but it would still engage the state’s responsibility in Strasbourg and still be a core public authority required to respect the ECHR in domestic law.⁷⁰ All things considered, *Radio France* is best seen as a fact-based exception to Strasbourg’s usual approach. It did not fundamentally change the law.

C. SUBSEQUENT CASES

Despite its exceptional nature, the relatively comprehensive analysis of prior Strasbourg rulings in *Radio France* seems to have made it a popular starting point for the ECtHR when rehearsing the governmental organisation principles in various cases that do not involve media freedom. A number of relevant cases concern the issue of whether the state can disclaim responsibility for the actions of a body which is wholly or partially state-owned but a separate legal entity distinct from the state in domestic law. With the exception of *Saliyev v Russia*,⁷¹ discussed below, all of these cases concern what I term the ‘state debt’ issue; namely, the state’s responsibility for state-owned companies that are unable or unwilling to meet domestic debt judgments against them. The state debt cases

⁷⁰ Space precludes fuller analysis of the BBC’s precise status under s 6, but see Fenwick and Phillipson (fn 32) 113-122 for discussion.

⁷¹ App no 35016/03 (ECtHR, 21 October 2010).

are a family of cases stemming from *Mykhaylenky v Ukraine*,⁷² the applicants being creditors who claim breaches of Art 1 FP and/or Art 6 ECHR after their domestic judgments go unsatisfied for long periods of time. An exhaustive analysis of the cornucopia of significant judgments to have applied *Radio France* is unnecessary, but the post-*Radio France* cases call for explanation on a general level because of their potential to confuse the governmental organisation jurisprudence if taken out of context. Isolated passages from *Radio France* now tend to be cited and applied without proper appreciation of its meaning, creating a real risk of destabilising what has hitherto been a relatively well-settled area of law.

Mykhaylenky v Ukraine is at the root of a long line of case-law that risks creating a misleading impression of the meaning of *Radio France*. The applicants were awarded judgment in domestic proceedings against their former employer, a state-owned construction company called Atomspetsbud. The ECtHR upheld the applicants' claim that the delay in satisfying their judgments amounted to a breach of Arts 6(1) and Art 1 FP ECHR, drawing on various factors to support its conclusion that the state was responsible for Atomspetsbud's failure to pay.⁷³ These factors related principally to the lack of institutional independence enjoyed by the company, given that it 'conducted its activities in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental control on account of environmental and public health considerations';⁷⁴ and that the company was state-owned and had been managed by the Ministry of Energy since 1998.⁷⁵ The ECtHR concluded as follows:

'the Government have not demonstrated that Atomspetsbud enjoyed sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention for its acts and

⁷² *Mykhaylenky v Ukraine* App no 35091/02 (ECtHR, 30 November 2004).

⁷³ *ibid.*, [45].

⁷⁴ *ibid.*

⁷⁵ *ibid.*

omissions (see, *mutatis mutandis* – and with reference to Article 34 of the Convention – [*Radio France v France*]...).⁷⁶

Taken in isolation, this passage could be read as suggesting that institutional and operational independence is now the touchstone for the meaning of a governmental organisation. A number of cases have since relied on *Mykhaylenko*, confounding the problem.⁷⁷ In *Lisyanskiy v Ukraine*,⁷⁸ for example, where the ECtHR ruled in similar circumstances that the delay by the state-owned Artema Coal Mine in satisfying debt judgments against it amounted to a violation of Art 6(1), it was baldly stated that:

‘as in the *Mykhaylenko and Others v Ukraine* case (see, nos. 35091/02 and following, §§ 44-45, ECHR 2004-...), the Government have failed to demonstrate that the debtor company enjoyed sufficient institutional and operational independence from the State to absolve it from liability under the Convention’.⁷⁹

Saliyev v Russia involved a similar issue to the state debt cases, despite not itself involving state debt. The applicant wrote an article alleging corruption by a Moscow official. The municipal newspaper began to publish it but later withdrew its print-run following an order by the editor-in-chief. The ECtHR found a violation of the right to freedom of expression under Art 10 ECHR, rejecting the argument that the state could not be directly responsible for the municipal paper’s actions. The newspaper represented the municipality, which in turn was an organ of the state.⁸⁰ Having cited *Radio France* and *Rundfunk*, the ECtHR noted that the newspaper ‘was incorporated as a separate legal entity and, in theory, its editorial board enjoyed a certain degree of freedom in deciding what to

⁷⁶ *ibid.*

⁷⁷ E.g. *Kucherenko v Ukraine* App no 27347/02 (ECtHR, 15 December 2005) [25]; *Liseytsseva* (fn 35) [186]-[187]; *Ališić v Bosnia and Herzegovina* App no 60642/08 (Grand Chamber, 16 July 2014) [114].

⁷⁸ App no 17899/02 (ECtHR, 4 April 2006).

⁷⁹ *ibid.*, [20].

⁸⁰ *Saliyev* (fn 71) [69].

publish'.⁸¹ Nevertheless, it concluded that the newspaper's independence 'was severely limited by the existence of strong institutional and economic links with the municipality and by the constraints attached to the use of its assets and property.'⁸² It noted that the paper:

'was set up to provide a public service (informing the population about official and other events in the town)... All of its real property and equipment belonged to the municipality. The editor-in-chief was appointed and paid by the municipality. Although in theory the newspaper was allowed to have independent sources of income (from advertising, for instance), they were of marginal importance and the newspaper existed thanks to the municipality's funding. Moreover, the municipality had the right to shape the newspaper's editorial policy, at least regarding "strategic" issues.'⁸³

Saliyev and the state debt cases might therefore be taken to suggest that independence rather than selflessness plays the central role in determining a body's governmental/non-governmental status. I would argue however that this cannot be what Strasbourg is saying. First, institutional independence cannot be more than a relevant factor in determining a body's governmental/non-governmental status, as argued above. As shown by the various cases discussed above including *Kotov*, selflessness is the underlying feature of the governmental/non-governmental distinction. Strong evidence is needed to take Strasbourg as having overturned an established line of case-law. Second, one would have expected some attempt on Strasbourg's part to explain why the previous line of case-law was incorrect, if its intention had indeed been to alter its general approach. No such attempt was made, however. Third, *Saliyev* and the state debt cases need to be set in context given the distinctiveness of the point at

⁸¹ *ibid.*, [65].

⁸² *ibid.*, [67].

⁸³ *ibid.*, [66].

stake. In all of these cases the state is attempting to disclaim responsibility for a body's actions by hiding behind the body's separate legal personality in domestic law. Again, in all of these cases, it is clear that the body has public-interest objectives and has been created by, is largely or wholly financed by, and has relatively strong institutional links with, the state. But for the question mark over the extent of the body's independence, the remaining evidence therefore points overwhelmingly to the conclusion that the body is a 'selfless' organisation for which the state is directly responsible. In these circumstances, the argument that the body's separate legal personality renders it sufficiently autonomous to be a non-governmental organisation, notwithstanding that all other factors point in the other direction, is the only argument that the state can really hope to make. It is not surprising that the ECtHR's discussion of the state responsibility issue revolves around an analysis of the degree of the body's independence in these cases: *of course* it will be central to the ECtHR's analysis, because in the circumstances it is the only factor that the state can pray in aid. It does not however follow that the law itself has changed.

D. CONCLUSION

None of the cases discussed above dent the basic idea that the selflessness principle underpins Strasbourg's distinction between governmental and non-governmental organisations. Non-governmental organisations remain non-governmental regardless of the functions they perform. For HRA and BBOR purposes, two consequences follow. First, the governmental organisation jurisprudence is of no assistance in determining the meaning of a public function in domestic law. The Strasbourg and s 6(3)(b) schemes ask entirely different questions. Second, the rights-stripping idea is baseless: even when performing public functions, hybrids are entitled to ECHR protection in both Strasbourg and domestic law. The meaning and scope of the public authority concept is a complex matter that is unlikely to become any simpler when examined during the

public consultation on the HRA's replacement that is widely reported to be commencing this autumn. Framers of the new legislation would be advised to bear the points in this article in mind during the process of BBOR design.